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Supreme Court, U.S.
FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-735

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RICHARD ROCKWOOD,
Petitioner

v.

BRIAN O'CONNELL and SHARON HILL,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
DIVISION SIX

# RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the California Court of Appeal properly affirm the trial court's refusal to allow Petitioner to offer evidence of alleged violations of 42 U.S.C. § 1983 which occurred outside the applicable statute of limitations when there was no substantial evidence of violations occurring during the limitations period?

## LIST OF PARTIES

Richard Rockwood: Petitioner, and Plaintiff-Appellant in the courts below.

Brian O'Connell and Sharon Hill: Respondents, and Defendants-Respondents in the courts below.

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# RESPONDENTS' BRIEF IN OPPOSITION

Respondents Brian O'Connell and Sharon Hill respectfully request the Court to deny the petition for writ of certiorari seeking review of the California Court of Appeal's decision in this case. That decision is set forth at pages 1 - 35 of Petitioner's Appendix.

## I. OPINIONS BELOW

Petitioner seeks a writ of certiorari to review the opinion of the State of California Court of Appeal, Second Appellate District, Division Six, which affirmed the judgment entered in favor of Respondents in the Superior Court of the State of California, County of Santa Barbara. [Petitioner's Appendix, pages 1 - 35.] The Court of Appeal's decision became final when the California Supreme Court denied Petitioner's petition for review. [California Rules of Court, Rule 24(a). Petitioner's Appendix, page 36.]

Petitioner filed suit under 42 U.S.C. § 1983, alleging that Respondents (supervisory personnel of the County of Santa Barbara) harassed him and caused him to be constructively terminated from his employment with the County, in retaliation

for his exercise of his free speech rights under the First Amendment to the United States Constitution. The free speech clause of the First Amendment is applicable to the County through the due process clause of the Fourteenth Amendment. [Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925).]

After Petitioner presented his case in chief at trial, Respondents moved for a nonsuit or, alternatively, for a directed verdict; those motions were granted and judgments of dismissal were entered.

Petitioner appealed the judgments of dismissal to the California Court of Appeal, which, in the decision that Petitioner asks this Court to review, affirmed the trial court. Petitioner's Petition for Rehearing in the Court of

Appeal was denied. [Petitioner's Appendix, page 37.] Likewise, Petitioner's Petition for Review in the California Supreme Court was denied. [Petitioner's Appendix, page 36.]

## II. JURISDICTION

Although not explicit on this point, the Petition appears to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

In the courts below, Petitioner sought money damages under 42 U.S.C. § 1983 for Respondents' alleged violations of Petitioner's free speech rights under the First Amendment to the United States Constitution.

## III. STATUTES OR OTHER PROVISIONS INVOLVED

Petitioner alleges that Respondents violated his free speech rights under the First Amendment to the United States Constitution, and are thus liable to Petitioner for damages under 42 U.S.C. § 1983.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## IV. STATEMENT OF THE CASE

### A. Petitioner's complaint

Petitioner initiated this action on August 10, 1987 by filing a complaint for damages and declaratory relief against Respondents, as well as other defendants who are no longer parties to the action. He alleged that he was constructively discharged from his employment as a "vehicle specialist" for the County of Santa Barbara as a result of numerous retaliatory acts by Respondents, all of which violated Petitioner's free speech rights.

Specifically, Petitioner alleged that he had attempted to speak out against corruption in the county motor pool, but was effectively silenced by the retaliatory acts of Respondents. Petitioner alleged that Respondents

subjected him to unduly harsh work requirements in retaliation for his speaking out against perceived misconduct in his department.

After Petitioner filed his complaint, Respondents responded by filing a demurrer (the California state equivalent of a motion to dismiss for failure to state a cause of action under Fed.R.Civ.P. 12(b)(6)). The trial court sustained the demurrer, but allowed Petitioner to amend his complaint. He did so, and defendants filed a demurrer to Petitioner's First Amended Complaint as well. That demurrer was also sustained and Petitioner was again allowed to amend. When Petitioner filed a Second Amended Complaint, defendants again responded by filing a demurrer, which the trial court sustained without leave to amend. Petitioner

appealed that ruling to the California Court of Appeal, which affirmed as to some defendants and reversed as to others, including Respondents. (See, Petitioner's Appendix, pages 54 et seq.)

The case against Respondents was thus remanded to the trial court for further proceedings.

B. Outcome in the trial court

Having survived the pleading stage, the case proceeded through discovery and to trial against Respondents. After Petitioner presented his case in chief, Respondents moved the trial court for a judgment of nonsuit, or, alternatively, for a directed verdict.

Under California law: "A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law,

the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff['s] evidence all the value to which it is legally entitled, ... indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor. [Citation.] A mere scintilla of evidence does not create a conflict for the jury's resolution; there must be substantial evidence to create the necessary conflict. [Citation.]" [Nally v. Grace Community Church (1988) 47 Cal.3d

278, 291, 253 Cal.Rptr. 97, 104, 763 P.2d 948. Internal quotation marks omitted. Brackets, ellipses, and emphasis in Nally text. See also, California Court of Appeal decision, Petitioner's Appendix, pages 9 - 11.]

Respondents' motions were granted because the trial court found that, even if the evidence most favorable to Petitioner was accepted as true, even if conflicting evidence was disregarded, even if Petitioner's evidence was given all the value to which it was legally entitled, and even if every legitimate inference which may be drawn from the evidence in Petitioner's favor was indulged, the evidence was still insufficient to permit a jury to find in Petitioner's favor. The trial court thus entered judgment dismissing Petitioner's case.

C. Outcome in the California state appellate courts

Petitioner appealed the trial court's judgment to the California Court of Appeal, which, in the opinion that Petitioner asks this Court to review, affirmed the trial court's decision. After reviewing every instance of Respondents' alleged misconduct, as presented by Petitioner at trial, the Court of Appeal stated: "Our review of the entire record reveals that [Petitioner] presented no substantial evidence upon which a jury could find that [R]espondents retaliated against him for his exercise of free speech or for harassment during the pertinent period of time." [Petitioner's Appendix, page 30.]

Petitioner's subsequent Petition for Rehearing in the Court of Appeal was

denied [Petitioner's Appendix, page 37], as was Petitioner's Petition for Review in the California Supreme Court [Petitioner's Appendix, page 36].

## V. REASONS FOR DENYING THE WRIT

### A. Examples of reasons for granting the writ, as stated in the rules of this Court

Rule 10.1 of the Rules of the Supreme Court of the United States identifies three non-exhaustive examples which "indicate the character of reasons that will be considered" by the Court in determining whether to grant review on writ of certiorari; two of the stated reasons concern review of state court decisions:

"(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

"(c) When a state court or a United States court of appeals has decided an

important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

B. Petitioner's stated ground for issuing the writ

Petitioner states only one ground for issuing the writ: "Review is necessary so that this Court can correct this state Court of Appeal's impliedly ruling that an employee may not maintain a hostile work environment - constructive termination claim under [42 U.S.C.] sec. 1983." [Petition, p. 25.]

As shown below, however, the Court of Appeal made no such ruling, impliedly or otherwise.

C. The California Court of Appeal did not rule that an employee may not maintain a hostile work environment - constructive termination claim under 42 U.S.C. § 1983.

Petitioner sued Respondents on August 10, 1987, alleging that Respondents were liable to Petitioner for money damages under 42 U.S.C. § 1983 for violating Petitioner's free speech rights under the First Amendment. Actions brought under section 1983 are subject to the statute of limitations for personal injuries prevailing in the state where the action is brought. [Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). See also, Petitioner's Appendix, page 5.] In California, that time period is one year. [California Code of Civil Procedure section 340(3). See also,

Petitioner's Appendix, page 5.] Thus, Petitioner could not recover for violations of 42 U.S.C. § 1983 which occurred before August 10, 1986.

Contrary to Petitioner's argument, however, the California Court of Appeal did not rule, impliedly or otherwise, that an employee may not maintain a hostile work environment - constructive termination claim under 42 U.S.C. § 1983. That issue was not before the court. The only issue before the Court of Appeal that is pertinent to the Petition was whether the trial court properly held that Petitioner failed to present enough evidence of violations of 42 U.S.C. § 1983 by Respondents during the applicable limitations period to allow the jury to decide the case. Most of the alleged "violations" were done by individuals

other than Respondents, and beyond the applicable statute of limitations.

The trial court determined, and the Court of Appeal affirmed, that even if the evidence most favorable to Petitioner was accepted as true, even if conflicting evidence was disregarded, even if Petitioner's evidence was given all the value to which it was legally entitled, and even if every legitimate inference which may be drawn from the evidence in Petitioner's favor was indulged, the evidence was still insufficient to permit a jury to find in Petitioner's favor.

Contrary to Petitioner's argument, the Court of Appeal, in its prior decision in this same case (rendered when Petitioner appealed the granting of the various defendants' demurrers without leave to amend), stated: "[E]ven though

[Petitioner] may be able to plead facts occurring prior to the statute [of limitations] in an attempt to show that the County adopted harassment as an official policy, he can only state a cause of action for conduct occurring within one year of the filing of his complaint." [Petitioner's Appendix, page 64. Emphasis added.]

Then, in the decision which Petitioner asks this Court to review, the Court of Appeal said: "Here, the facts actually proffered at trial establish that [R]espondent[s] never engaged in actionable discriminatory practices. Accordingly, there could be no prior 'continuing' acts to which the evidence presented could relate." [Petitioner's Appendix, page 9. Emphasis added.] Having failed to present enough evidence to go to the jury on his

allegation that Respondents engaged in conduct that violated 42 U.S.C. § 1983 during the limitations period, Petitioner was precluded from introducing evidence of conduct outside the statute of limitations. The trial court found, and the Court of Appeal affirmed, that there were no violations of 42 U.S.C. § 1983, continuing or otherwise, within the applicable period of limitations. Even assuming that Petitioner could show violations of 42 U.S.C. § 1983 occurring outside the limitations period, there could be no actionable "continuing violation" because Petitioner failed to present evidence of violations occurring during the limitations period.

In addition, even assuming Petitioner could show violations of 42 U.S.C. § 1983 occurring outside the limitations period,

there was no actionable "continuing violation" because -- even though urged by the trial court to do so -- Petitioner failed to present any evidence which showed that the alleged acts beyond the statute were in any way related to alleged acts within the statute of limitations.

D. The decision which Petitioner asks this Court to review did not decide a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

The California Court of Appeal's decision is consistent with appellate decisions discussing "continuing violation" theories in the context of other federal statutes. For example, the Seventh Circuit Court of Appeals approved

evidence of violations of 42 U.S.C. § 1981 that occurred outside the applicable statute of limitations period in order to prove a "continuing violation" theory. However, the Seventh Circuit stated that evidence of acts occurring outside the limitations period is expressly conditioned on the existence of evidence of a violation occurring within the statute of limitations. [Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989).]

In Malhotra, plaintiff sued his employer, alleging discrimination on the basis of ethnic background, "in violation of both 42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964) and 42 U.S.C. § 1981 (Civil Rights Act of 1866)." [885 F.2d at 1308.] Plaintiff alleged that his employer had improperly denied

him a promotion ten times; six of those denials occurred outside the applicable statute of limitations. [885 F.2d at 1310.] "With respect to [those six denials] the question of limitations is whether Malhotra may reach back that far on a theory of 'continuing violation'." [Id.]

The Seventh Circuit explained "the principle of Stewart v. CPC International, Inc., 679 F.2d 117, 121 (7th Cir. 1982) (per curiam), that no part of a continuing violation which persists into the period within which suit is allowed is time-barred": "The qualification is essential. There must be a violation within the period of the statute of limitations. [Citation.] If, having proved such a violation, the plaintiff goes on to prove that it began earlier and that its earlier

manifestation caused him additional injury, he can obtain a remedy for the increment as well as for the injury inflicted by the recent violation." [Id. Emphasis in Malhotra text.] Without a violation occurring within the limitations period, however, acts outside the statute of limitations are time-barred.

A contrary holding "would make a nullity of the concept of limitations" because it would allow a plaintiff to introduce evidence of alleged civil rights violations, without regard to when those violations occurred, even if no violations occurred during the limitations period that applies under Wilson v. Garcia, supra; the statute of limitations would never expire. [Petitioner's Appendix, page 63.]

The decision that Petitioner asks

this Court to review is consistent with federal appellate decisions on analogous issues. There is no reason to grant the writ.

E. The decision which Petitioner asks this Court to review did not decide an important question of federal law which has not been, but should be, settled by this Court; nor did it decide a federal question in a way that conflicts with applicable decisions of this Court.

As discussed above, the California Court of Appeal opinion which Petitioner has asked this Court to review does not conflict with prevailing federal law. Nor did the opinion make any ruling in an unsettled area of the law.

After discussing the requirements of

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), regarding the free speech rights of public employees, the Court of Appeal methodically reviewed every instance of alleged civil rights violations presented by Petitioner. The court then stated: "Accepting [Petitioner's] evidence as true, could a reasonable jury find substantial evidence that [Petitioner] spoke out about matters of public concern after August 10, 1986 motivating either [Respondent] to retaliate against him? If so, did [Respondents] bear the burden of establishing that they would have reached the same decision on legitimate business

grounds regardless of his speech? We have perused the entire transcript to consider these questions." [Petitioner's Appendix, pages 17 - 18.]

The Court of Appeal, like the trial court, found that Petitioner failed to produce enough evidence even to allow the jury to decide the case: "Our review of the entire record reveals that [Petitioner] presented no substantial evidence upon which a jury could find that [R]espondents retaliated against him for his exercise of free speech or for harassment during the pertinent period of time." [Petitioner's Appendix, page 30.]

The Court of Appeal did what courts most often do: it applied settled law to the facts of the particular case before it. Petitioner has not provided this Court with any basis for reviewing the

Court of Appeal's decision; Respondents contend there is none. Petitioner simply wants this Court to re-hear and re-weigh the evidence presented to the state trial court, and to decide that, on the facts of this particular case, the trial court should have reached a different decision.

## VI. CONCLUSION

Petitioner has provided no basis for review by this Court. Respondents respectfully request the Court to deny the Petition.

Date: November 17, 1994

TARDIFF & STATON

By: Neil S. Tardiff
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Also on the Brief in Opposition: Will Tomlinson, of Tardiff & Staton, and Stephen D. Underwood, Deputy County Counsel for the County of Santa Barbara